STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Whitbeck, C.J. and White. and Donofrio, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 124083

-vs-

LATASHA GENISE MORSON,

Defendant-Appellee.

Court of Appeals No. 238750
Oakland County CC No. 99-167284-FC

APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

This Court entered an order on November 26, 2003 (226a), granting Plaintiff-Appellant's application for leave to appeal from an Unpublished Per Curiam Opinion of May 29, 2003 of the Court of Appeals. (Whitbeck, C.J., White, and Donofrio J.J.). 223a-225a

The defendant was convicted of Armed Robbery contrary to MCL 750.529 at a bench trial with Judge John J. McDonald presiding on September 28, 2001 (200a-201a) and sentenced on December 10, 2001. 221a-222a At sentencing, Judge McDonald scored defendant's OV 1 [MCL 777.31] 25 points for discharge of a weapon toward a human being and OV 3 [MCL 777.33] 25 points for life-threatening injury to a victim. He also assessed the defendant 10 points for OV 9 [MCL 777.39] for multiple victims. 263a

The defendant appealed Judge McDonald's sentence and the Court of Appeals remanded for resentencing based on Judge McDonald's scoring of defendant's offense variables. 223a-225a

The prosecution appealed to this Court and this Honorable Court granted the People's application. 226a

STATEMENT OF QUESTIONS PRESENTED

I, II, IV. IS THE INTERPRETATION OF THE COURT OF APPEALS IN PEOPLE V LIBBETT, 251 MICH APP 353; 650 NW2d 407 (2002) OF MCL 777.31 AND MCL 777.33 WHICH GIVES EFFECT TO ALL WORDS AND PROVISIONS WITHIN THE STATUTES AND PROMOTES ACCURATE SCORING OF THE SENTENCING GUIDELINES, CORRECT?

The People, Plaintiff-Appellant, submit the answer is, "Yes."

III. BECAUSE THE LEGISLATURE DID NOT LIMIT MCL 777.31(2)(b) AND MCL 777.33(2)(a) AND, WITH A BROAD INTERPRETATION OF THE STATUTES, CO-DEFENDANTS ARE HELD RESPONSIBLE FOR THE RAMIFICATIONS OF COLLECTIVE CRIMINAL ENTERPRISE, DOES MCL 777.31(2)(b) AND MCL 777.33(2)(a) APPLY ONLY TO THOSE OFFENDERS CHARGED WITH THE SAME CRIMES?

The People, Plaintiff-Appellant, submit the answer is, "No."

V. BECAUSE MCL 769.31(d) DIRECTS COURTS TO CONSIDER AGGRAVATING FACTORS RELATING TO THE OFFENSE, AND VIOLENCE AGAINST A THIRD PARTY DURING THE SAME CRIMINAL TRANSACTION AS THE CHARGED CRIME IS AN AGGRAVATING FACTOR, CAN THE COURT CONSIDER THE ENTIRE CRIMINAL EPISODE WHEN SCORING OV 9?

The People, Plaintiff-Appellant, submit the answer is, "Yes."

VI. WHEN A COURT'S SCORING OF THE SENTENCING GUIDELINES CAN NOT INCREASE A DEFENDANT'S STATUTORY MAXIMUM, DOES A SCORING OF OV 1, 3, OR 9 BY THE SENTENCING COURT VIOLATE DUE PROCESS?

The People, Plaintiff-Appellant, submit the answer is, "No."

STATEMENT OF FACTS

Defendant, Latasha Morson, and her co-defendant, Iesha Northington, were charged with crimes which arose out of a robbery and shooting which occurred on May 29, 1999.

Iesha Northington pled guilty to armed robbery [MCL 750.529] as well assault with intent to commit murder [MCL 750.83] arising out of this incident.[1] 253a Northington pled in front of Judge Barry Howard pursuant to a Cobbs' agreement [People v Cobbs, 443 Mich 276; 505 NW2d 208 (1993)] for a minimum of 171 months. 237a-238a When Northington's guidelines were scored for the most severe offense, assault with intent to commit murder, 25 points were assessed for OV 1 for discharging a firearm toward a human being, and 25 points for OV 3 for life-threatening injury to a victim. Northington was also scored 10 points for two victims in OV 9. 251a These points were not assessed for OVs 1 and 3 for her armed robbery guidelines. 252a [However, these guidelines were apparently not disputed because the armed robbery sentence was imposed concurrently with the higher assault sentence and there was a Cobbs' agreement for Northington's plea. 253a, 258a]

After Northington's plea and sentence, defendant went to trial in front of Judge John J. McDonald. Defendant was charged with armed robbery but not charged with assault with intent to murder.[2] The evidence revealed that on May 29, 1999, defendant

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[1] She also pled guilty to conspiracy to commit armed robbery [MCL 750.157a and MCL 750.529], felon in possession of a firearm [MCL 750.224f], carrying a concealed weapon [MCL 750.227], and three counts of felony firearm. MCL 750.227b. 253a

[2] Defendant was also charged with conspiracy to commit armed robbery [MCL 750.157a and MCL 750.529], as well as felony firearm. MCL 750.227b.

was driving around with Northington and they discussed robbing a woman they saw walking down the street. 43a-45a, 86a Defendant then provided a gun to Northington. 86a Northington got out and pointed the gun at the woman (by the name of Deborah Sevakis), demanding her purse. 46a Northington pushed the woman down, grabbed her purse and ran away. 49a, 52a, 65a

A witness to the robbery (by the name of James Bish) chased after Northington and, when he was two feet from her, Northington shot Mr. Bish in the chest, puncturing his lung. 66a-68a

Meanwhile, defendant had pulled the car to the corner and Northington ran up to the car saying she had shot someone. 87a Northington and defendant then left the scene and attempted to go shopping with a credit card from Ms. Sevakis' purse. 87a They purchased gas at the gas station and attempted to purchase approximately $500.00 worth of items at K-Mart. 87a, 146a, 160a However, by that time, the credit card was no longer working. 146a Defendant later returned the weapon to the person she had originally obtained it from. 88a

Judge McDonald found the defendant guilty of aiding and abetting an armed robbery.[3] 200a-201a At sentencing, over defense counsel's objection, Judge McDonald scored OV 1, 25 points for discharge of a weapon toward a human being, and OV 3, 25 points for life-threatening injury. He also assessed 10 points for multiple victims in OV 9. 207a, 211a, 212a

[3] Judge McDonald also found the defendant guilty of conspiracy to commit armed robbery and felony firearm. 199a-201a

Defendant appealed her sentence and the Court of Appeals remanded for resentencing holding that Judge McDonald had been bound by the previous offense variable scoring for OVs 1 and 3 on Northington's armed robbery guidelines. The Court of Appeals also found that Judge McDonald could not take into consideration the shooting of the witness by Northington when assessing points for multiple victims under OV 9 when the shooting occurred after the robbery had been completed. 223a-225a

The People appealed this ruling and this Honorable Court granted leave requesting the parties to address the following questions:

> How subsection 1 of MCL 777.31 (OV 1), requiring that the "highest number of points" be assigned, should be applied in light of subsection 2(b), requiring that "all offenders" in multiple offender cases be assessed the same number of points?
>
> Similarly, how subsection 1 of MCL 777.33 (OV 3), requiring that "the highest number of points" be assigned, should be applied in light of subsection 2(a), requiring that "all offenders" in multiple offender cases be assessed the same number of points?
>
> Whether MCL 777.31(2)(b) and 777.33(2)(a) apply where all "offenders" have not been charged with identical crimes?
>
> Whether under MCL 777.31(2)(b) and MCL 777.33(2)(a) the trial court is bound by a previously-imposed sentence upon a codefendant where that sentence is based upon an erroneous offense variable score?
>
> Whether under MCL 777.39 (OV 9) the number of persons placed in danger includes only those persons who are placed in danger during the particular crime for which defendant is being scored (here, armed robbery), or whether that number includes all persons placed in danger at any point during the criminal episode?

> Whether the due process clauses of the state and federal constitutions require that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person? [See: Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002); Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) and Washington v Blakely, 111 Wash App 851; 47 P3d 149 (2002), cert gtd sub nom Blakely v Washington, 2003 US LEXIS 7709 (U.S., 10/20/03, Docket No. 02-1632] 226a

Additional pertinent facts will be discussed in the body of the argument section of this brief, Infra to the extent necessary to fully advise this Honorable Court as to the issues raised.

ARGUMENT

I, II, IV. THE INTERPRETATION OF THE COURT OF APPEALS IN PEOPLE V LIBBETT, 251 MICH APP 353; 650 NW2d 407 (2002) OF MCL 777.31 AND MCL 777.33 GIVES EFFECT TO ALL WORDS AND PROVISIONS WITHIN THE STATUTES AND PROMOTES ACCURATE SCORING OF THE SENTENCING GUIDELINES.

Standard of Review:

Statutory interpretation presents a question of law that this Court reviews de novo. People v Denio, 454 Mich 691, 698; 564 NW2d 13 (1997)

Issue Preservation:

Defendant objected to the scoring of OV 1 and 3 at sentencing. 207a-211a Defendant appealed the sentencing court's scoring decision to the Court of Appeals.

The Court of Appeals found that Judge McDonald was bound by the previous scoring of the co-defendant's armed robbery guidelines which did not account for a discharge of a weapon or life-threatening injury to a victim. 223a-224a

This Honorable Court granted the People's application for leave to appeal directing the parties to answer the following questions:

> How subsection 1 of MCL 777.31 (OV 1), requiring that the "highest number of points" be assigned, should be applied in light of subsection 2(b), requiring that "all offenders" in multiple offender cases be assessed the same number of points?

Similarly, how subsection 1 of MCL 777.33 (OV 3), requiring that "the highest number of points" be assigned, should be applied in light of subsection 2(a), requiring that "all offenders" in multiple offender cases be assessed the same number of points?

* * *

Whether under MCL 777.31(2)(b) and MCL 777.33(2)(a) the trial court is bound by a previously-imposed sentence upon a codefendant where that sentence is based upon an erroneous offense variable score? 226a

Discussion:

The Court of Appeals' holding in People v Libbett, 251 Mich App 353; 650 NW2d 407 (2002) gives effect to all provisions in MCL 777.31 and MCL 777.33 and also prevents erroneous scoring decisions in previous cases from being automatically imputed to all co-defendants.

When the co-defendant's guidelines were scored for the most severe offense, assault with intent to commit murder, 25 points were assessed for OV 1 for discharging a firearm toward a human being, and 25 points for OV 3 for life-threatening injury to a victim. 251a These points were not assessed for OVs 1 and 3 for Northington's armed robbery guidelines, even though she had shot Mr. Bish in the chest, causing life-threatening injury.[4] 252a

After the co-defendant's plea and sentence, defendant went to trial in front of Judge McDonald. Defendant was charged with the armed robbery but not charged with the assault with intent to murder. Judge McDonald found the defendant guilty of aiding

[4] However, these guidelines were apparently not disputed because the armed robbery sentence was imposed concurrently with the higher assault sentence and there was a Cobbs' agreement for Northington's plea. 253a, 258a

and abetting an armed robbery. 200a-201a At sentencing, over defense counsel's objection, Judge McDonald scored OV 1, 25 points for discharge of a weapon toward a human being, and OV 3, 25 points for life-threatening injury. Judge McDonald scored the defendant's guidelines consistently with her co-defendant's assault with intent to murder guidelines. 207a, 211a, 212a,

On appeal, the Court of Appeals found that Judge McDonald had to score defendant's armed robbery guidelines consistently with her co-defendant's armed robbery guidelines even though Northington's guidelines did not score for a discharge of a weapon or life-threatening injury. 223a-224a

MCL 777.31 in effect at the time of the commission of the offense stated:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining ***which of the following apply*** and ***by assigning the number of points attributable to the one that has the highest number of points***:
>
> > (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon-*25 points*
> >
> > (b) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon-*15 points*
> >
> > (c) The victim was touched by any other type of weapon-*10 points*
> >
> > (d) A weapon was displayed or implied-*5 points*
> >
> > (e) No aggravated use of a weapon occurred-*0 points*

(2) All of the following apply to scoring offense variable 1:

> (a) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (b) ***In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.***
>
> (c) Score 5 points if an offender used an object to suggest the presence of a weapon.
>
> (d) Do not score 5 points if the conviction offense is a violation of section 82 or 529 of the Michigan penal code, 1931 PA 328, MCL 750.82 and 750.529.[5] (emphasis supplied)

MCL 777.33 in effect at the time of the incident read:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining ***which of the following apply*** and ***by assigning the number of points attributable to the one that has the highest number of points***:
>
> (a) A victim was killed-*100 points*
>
> (b) Life threatening or permanent incapacitating injury occurred to a victim-*25 points*
>
> (c) Bodily injury requiring medical treatment occurred to a victim-*10 points*
>
> (d) Bodily injury not requiring medical treatment occurred to a victim-*5 points*
>
> (e) No physical injury occurred to a victim-*0 points*

[5] Though MCL 777.31 has been amended since May of 1999, the date of defendant's crime, to include scoring for biological, chemical, and radioactive weapons, the wording of the pertinent subsections discussed in this appeal have remained intact.

(2) All of the following apply to scoring offense variable 3:

> (a) ***In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.***
>
> (b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.
>
> (c) Do not score 5 points if bodily injury is an element of the sentencing offense.

(3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.[6]

There are two manners in which MCL 777.31 and MCL 777.33 in multiple offender cases have been interpreted. One interpretation, such as that espoused by the Court of Appeals in this case, is that the sentencing judge in a defendant's case is automatically bound by a prior scoring by a co-defendant's judge [or probation officer] regardless of whether the previous scoring was accurate. The second interpretation is that, in a defendant's case, the judge is not bound by a previous judges' [or probation officer's] scoring but instead that a defendant's judge must assess points for all offenders, taking into consideration the directive to award the highest amount possible, and apply this scoring in defendant's case. See: People v Libbett, 251 Mich App 353; 650 NW2d 407 (2002) The People assert that the latter interpretation is correct.

"[T]he meaning of statutory language, plain or not, depends on context." People v Vasquez, 465 Mich 83, 89; 631 NW2d 711 (2001) quoting King v St. Vincent's Hospital,

[6] Though MCL 777.33 has also been amended since May of 1999 to include scoring 100 points for certain homicide offenses, in this variable also, the wording of the pertinent subsections discussed in this appeal have remained unchanged.

502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991) See also: Herald Co. v City of Bay City 463 Mich. 111, 130 n 10; 614 NW2d 873 (2000)(indicating "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis,*" which "stands for the principle that a word or phrase is given meaning by its context or setting." citing Tyler v Livonia Public Schools, 459 Mich 382, 390-391; 590 NW2d 560 (1999)) and Wilmers v Gateway Transportation Co. (On Remand), 227 Mich App 339, 352; 575 NW2d 796 (1998) (Young, P.J., dissenting)) Each of the subsections must be read in the context of the entire statute so as to produce a harmonious whole. Macomb County Prosecutor v Murphy, 464 Mich 149, 159-160; 627 NW2d 247 (2001) When two statutes lend themselves to a construction that avoids conflict, that construction should control. Jackson Community College v Department of Treasury, 241 Mich App 673, 681; 621 NW2d 707 (2000) It is equally clear that the Court must give effect to all words and provisions within a statute, so as to avoid a construction that renders ***any part of a statute*** nugatory. Pohutski v City of Allen Park, 465 Mich 675, 683-684; 641 NW2d 219 (2002)

With the interpretation that the sentencing court is bound by a previous scoring in another case, MCL 777.31(1) and MCL 777.33(1) appear to conflict with MCL 777.31(2)(b) and MCL 777.33(2)(a). Though in MCL 777.31(1) and MCL 777.33(1) the Legislature directed the court to review the possible scorings and see which of the following apply and according the highest score, in MCL 777.31(2)(b) and MCL 777.33(2)(a), the sentencing court is then, in multiple offender cases, told to assess whatever score was accorded in a co-defendant's case, regardless of whether the prior court or probation officer awarded the highest number of points.

Just this situation occurred in the Court of Appeals case of People v Libbett, supra. In Libbett, the defendant was convicted of carjacking [MCL 750.529a]. Like defendant in this case, Libbett contested the sentencing court's scoring of OV 1, aggravated use of a weapon, and OV 3, physical injury to the victim. Before Libbett's trial, the co-defendant had pled guilty pursuant to a plea agreement and was sentenced. Libbett argued that the scoring on his case for OVs 1 and 3 was bound by the previous scoring on these two OVs in his co-defendant's case even though everyone conceded the prior court's scoring was erroneous and not the highest possible score.

As the facts in Libbett demonstrate, reading MCL 777.31(2)(b) and MCL 777.33(2)(a) in isolation would render MCL 777.31(1) and MCL 777.33(1) directing the court to assess which of the scorings was applicable and to award the highest amount possible, nugatory. This construction would mean that the court would have to disregard the directive in MCL 777.31(1) and MCL 777.33(1) to score the highest score.

Also reading MCL 777.31(2)(b) and MCL 777.33(2)(a) in isolation would lead to absurd results. An erroneous scoring in a co-defendant's case would automatically carry over to that of every subsequent defendant. For example, if a co-defendant had erroneously been scored 100 points in OV 3 when this variable could not have been scored because homicide was the sentencing offense, this scoring would automatically be applied to the defendant's case. Also, in multiple offender cases oftentimes some co-defendants plead guilty and others take their cases to trial. The facts elicited at trial are many times much more exhaustive than would have been included in the Presentence Report of the co-defendant who pled. See: Libbett, supra at 367, n 8 Reading MCL

777.31(2)(b) and MCL 777.33(2)(a) in isolation would require the sentencing judge of cases in which there had been trials, to ignore facts on the record, and not to award the highest possible score.

However, the Court of Appeals in Libbett found that MCL 777.31 and MCL 777.33 should not be interpreted to require the sentencing judge to automatically apply the scoring in a co-defendant's case. The Court of Appeals in Libbett stated:

> When reading M.C.L §777.31 in its entirety, it is clear that the Legislature intended for the sentencing courts to first ***accurately*** determine the highest number of points that are to be scored under M.C.L §777.31(1)(a)-(e) and then to assess the same number of ***accurately*** scored points to multiple offenders in the same case under M.C.L §777.31(2)(b). If we were to read subsection 2(b) in isolation, as defendant suggests, then we would not be giving effect to subsection 1, which requires that the court first ***accurately*** score the offense variable by assigning the defendant the highest number of attributable points that apply. MCL 777.31(1) In this case, however, it is undisputed that the five points initially assessed to Jerome [Libbett's co-defendant] were scored incorrectly because both parties and the trial court recognized that the proper score under M.C.L. §777.31(1) and the facts of this case would be fifteen points. Accordingly, we hold that Jerome's erroneous score for OV 1 did not statutorily bind the trial court under M.C.L. §777.31(2)(b) to assess the same erroneous score for defendant in this case.[7] (emphasis supplied) Id. at 367

The construction of the statute given by the Court of Appeals in Libbett leads to a "harmonious whole", gives effect to all parts of the statute, and avoids conflict between different subsections in the same statute. "[I]n seeking meaning, words and clauses will not be divorced from those which proceed and those which follow." Libbett, supra at 366

[7] Libbett also held that because no points were assessed under OV 3 in Libbett's co-defendant's case and the statute only discussed awarding the same number of ***points***, Libbett's judge was not bound by the previous court's decision not to award any points under OV 3 for co-defendant. Libbett, supra at 364, n 6 Accordingly, Judge McDonald was not bound by a zero point scoring on OV 3 for Northington's armed robbery guidelines.

citing Herald Co. v Bay City, supra Instead of being bound by a prior court's perhaps erroneous scoring in a different case with possibly different facts on the record, in multiple offender cases, the sentencing court in a defendant's case looks at the conduct of all offenders, assesses the highest number of points for any offender, and in the defendant's case, applies this number.

The words of the statute must be given their ordinary construction, according to their common and approved usage. MCL 8.3a Statutory language must be evaluated considering the present tense of the verbs employed. Michalski v Bar-Levav, 463 Mich 723, 733; 625 NW2d 754 (2001); Chmielewski v Xermac, Inc., 457 Mich 593, 610 n 20; 580 NW2d 817 (1998)(The Court's reading of the statute, "honors the Legislature's choice of the present tense."); Farm Bureau Mutual Insurance Co. of Michigan v Porter & Heckman, Inc., 220 Mich App 627, 642 n 11; 560 NW2d 367 (1996) If the Legislature uses the present tense, the act must be currently occurring. Deschaine v St. Germain, 256 Mich App 665, 670, 672; 671 NW2d 79 (2003)("[P]resent tense" means "being, existing, or occurring at this time or now".)

The verb "is assessed" used in MCL 777.31(2)(b) and MCL 777.33(2)(a) is the passive voice of the present tense of the verb "assesses". Fowler & Aaron, The Little, Brown Handbook (Boston: Scott, Foresman & Company, 1989) ch 7, p 226, 235 The statutory language supports the interpretation of the statute that requires the sentencing court currently in a defendant's case to assess points to all offenders and apply the highest number of points to defendant and not to rely on past scoring decisions which

have already taken place in another case by a different judge or probation officer which may be erroneous or may not be the highest score.[8]

If this Court finds that the interpretation of MCL 777.31 and MCL 777.33 in multiple offender cases is ambiguous, the Court can turn to legislative intent. Statutory language is clear and unambiguous ***only when reasonable minds could not differ*** with regard to its meaning. People v Armstrong, 212 Mich App 121, 123; 536 NW2d 789 (1995) The ultimate goal of the Legislature in passing the sentencing guidelines was to tailor a sentence to the circumstances of the case. See: MCL 769. 31, MCL 769.33[9] The only way that sentences correctly reflect the factors in each individual case is by accurate scoring. The Legislature recognized this premise by allowing the courts to resentence offenders based on misscored guidelines. MCL 769.34(10) The goal of accurate scoring would not be furthered by an interpretation of MCL 777.31 and MCL 777.33 which

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[8] Holding that the present sentencing court is bound by a previous court's scoring is not supported by the wording of the statutes. For this interpretation of the statute to be accurate, the statute should have been drafted in one of the following manners:

> In multiple offender cases, if 1 offender ***has been*** or ***was*** assessed points for death or physical injury, all offenders shall be assessed the same number of points.
>
> *or*
>
> In multiple offender cases, if 1 offender is assessed points for death or physical injury ***by a co-defendant's judge*** or ***at a co-defendant's sentencing***, all offenders shall be assessed the same number of points.

However, in addition to the fact that the Legislature used the present tense of the verb, the Legislature did not include language requiring the sentencing court to apply a previous court's scoring. "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." In Re Wayne Co. Prosecutor, 232 Mich App 482, 486; 591 NW2d 359 (1998)

requires an error in a previous case to be automatically imputed to all other co-defendants. See: Libbett, supra at 367 (indicating that the goal of the Legislature in MCL 777.31 and MCL 77.33 was to promote accurate scoring of these offense variables)

Also, the shooting of Mr. Bish was an aggravating factor relating to the offense which should be taken into consideration in this case. See: MCL 769.31(d)(indicating that the "offense characteristics" of a crime involve the aggravating factors relating to the offense); MCL 769.33(1)(e)(ii)(considering the crimes of violence as more severe) The defendant encouraged and incited the co-defendant, Northington, to rob Ms. Sevakis and provided Northington with the gun for the robbery. By encouraging and inciting an armed robbery, defendant set in motion a force likely to cause death or great bodily harm. People v Carines, 460 Mich 750, 760; 597 NW2d 130 (1999) reh den 461 Mich 1205; 602 NW2d 576 (1999) The defendant's knowledge that Northington was armed would have been enough for a rational trier of fact to find that the defendant, as an aider and abettor, participated in the crime with the knowledge of Northington's intent to cause great bodily harm. People v Turner, 213 Mich App 558, 572; 540 NW2d 728 (1995) See also: MCL 767.39(which abolished the distinction between an aider and abettor and principal and held both similarly responsible for a crime) The use of a gun against a bystander who attempted to apprehend the robber is also a foreseeable part of any robbery (People v Day, 169 Mich App 516, 517; 426 NW2d 415 (1988); Carines, supra;

[9] MCL 769.33 was repealed in 2002 after the Sentencing Guidelines Commission had completed its task; i.e. after the sentencing guidelines had been passed by the Legislature and initial modifications had been proposed.

Turner, supra) and should be considered as an aggravating factor in defendant's case and therefore scored in the guidelines.

The Court of Appeals in Libbett's interpretation of MCL 777.31 and MCL 777.33 gives effect to all phrases in these statutes and furthers the Legislature's goal to promote accurate scoring of the sentencing guidelines.

ARGUMENT

III. BECAUSE THE LEGISLATURE DID NOT LIMIT MCL 777.31(2)(b) AND MCL 777.33(2)(a) ONLY TO THOSE OFFENDERS CHARGED WITH THE SAME CRIMES, CO-DEFENDANTS ARE HELD RESPONSIBLE FOR THE RAMIFICATIONS OF COLLECTIVE CRIMINAL ENTERPRISE.

Standard of Review:

Issues of statutory interpretation are reviewed de novo by this Court. Denio, supra

Issue Preservation:

Defendant objected to OV 1 and 3 at sentencing. 207a-211a Defendant appealed the sentencing court's scoring decisions to the Court of Appeals. The Court of Appeals held that Judge McDonald was bound by the scoring in the co-defendant's armed robbery guidelines [even though the co-defendant's assault with intent to murder guidelines reflected a higher scoring and the co-defendant had shot a bystander in the chest with a gun provided for the robbery by the defendant]. 66a-68a, 223a-224a, 251a

This Honorable Court granted the People's application for leave to appeal directing the parties to answer the following question:

> Whether MCL 777.31(2)(b) and 777.33(2)(a) apply where all "offenders" have not been charged with identical crimes?

Discussion:

The Legislature could clearly have limited multiple offender cases to those cases in which defendants are charged with the same crime, but declined to do so. Also a broad interpretation of MCL 777.31(2)(b) and MCL 777.33(2)(a) holds co-defendants

responsible for the ramifications of their decision to engage in a collective criminal enterprise.

MCL 777.31(2)(b) and MCL 777.33(2)(a) state:

> In multiple offender cases, if 1 offender is assessed points for presence or use of a weapon/death or physical injury, all offenders shall be assessed the same number of points.

In these statutes and in MCL 769.31, the definitional section, there is no requirement that, for MCL 777.31(2)(b) and MCL 777.33(2)(a) to apply, multiple offenders must be prosecuted out of the incident, or that multiple offenders must be charged with, or convicted of, the same crime. "'The Legislature is presumed to be familiar with the principles of statutory construction' and when promulgating new laws it is presumed to be aware of the consequences of its use or omission of statutory language." People v Albers, 258 Mich App 578; 672 NW2d 336 (2003) citing People v Ramsdell, 230 Mich App 386, 392; 585 NW2d 1 (1998) The Legislature could clearly have limited multiple offender cases either in the specific offense variables or in the general definitional section, MCL 769.31, to those cases in which co-defendants were prosecuted or charged with or convicted of identical crimes but it did not. Furthermore "[a] court must not judicially legislate by adding into a statute provisions that the Legislature did not include." In Re Wayne Co. Prosecutor, 232 Mich App 482, 486; 591 NW2d 359 (1998) To add a limitation in multiple offender cases that more than one individual must have been charged out of the incident, must have been charged with the same offense, or must have been convicted of the same crime would be reading additional language into MCL 777.31 and MCL 777.33 which the Legislature did not see fit to add.

It was reasonable for the Legislature to allow scoring for MCL 777.31(2)(b) and MCL 777.33(2)(a) even when multiple individuals are not prosecuted out of the same incident, or when co-defendants are not charged with or convicted of the same crime. When individuals engage in a criminal enterprise they should be held responsible for the ramifications of collective action regardless of whether all individuals were caught and prosecuted or whether co-defendants are charged with or convicted of different crimes. If the Legislature required that multiple offenders be prosecuted, this requirement would reward defendants whose co-defendants were never apprehended. Also the prosecution may have different policy reasons for charging different individuals with different offenses especially when the crimes would carry concurrent sentences (such as in Northington's case, 253a). However, the prosecution's charging decision does not change the facts of the incident which may show collective action. Furthermore, all offenders need not be convicted of the same crime because facts supporting scoring decisions do not have to be proven beyond a reasonable doubt. See: Argument VI, Infra

Also, aggravated use of a weapon and physical injury to a victim are aggravating factors involving violence and the Legislature directed the sentencing commission when drafting the sentencing guidelines to weigh crimes of violence more severely. MCL 769.33(1)(e)(ii) Therefore, a broad interpretation of MCL 777.31 and MCL 777.33 allowing scoring for injury which results from a collective criminal enterprise is

merited.[10]

In this case, the only reason Mr. Bish was shot was because the defendant gave a gun to her co-defendant to commit a robbery. The use of a gun against a bystander who attempted to apprehend the robber was also foreseeable. Day, supra; Carines, supra; Turner, supra Both the defendant and co-defendant were charged out of the incident, the

ARGUMENT

V. MCL 769.31(d) DIRECTS COURTS TO CONSIDER AGGRAVATING FACTORS RELATING TO THE OFFENSE, AND VIOLENCE AGAINST A THIRD PARTY DURING THE SAME CRIMINAL TRANSACTION AS THE CHARGED CRIME IS AN AGGRAVATING FACTOR.

Standard of Review:

Resolution of this issue turns on a question of statutory construction which this Court reviews de novo. People v Jones, 467 Mich 301, 304; 651 NW2d 906 (2002)

Issue Preservation:

The defendant objected to the scoring of OV 9 at sentencing. 211a-212a Defendant appealed the sentencing court's scoring decision to the Court of Appeals. The Court of Appeals held:

> OV 9, number of victims, is to be scored at ten points if two to nine victims were involved. The instructions state that "each person who was placed in danger of injury or loss of life" is counted as a victim. Morson was assessed ten points. ***Sevakis and Bish were both placed in danger during the criminal episode.*** However, only Sevakis was placed in danger during the robbery. Bish was not in the immediate vicinity during the robbery and the robbery was complete by the time he intervened. Moreover, the instructions do not include that "the entire criminal transaction" is to be considered in scoring this variable as do, for example, those for OV 14. Accordingly, we conclude that Morson should have been assessed zero points for one victim. (emphasis supplied) 224a-225a

This Honorable Court granted the prosecution's application for leave to appeal directing the parties to address the following question:

Whether under MCL 777.39 (OV 9) the number of persons placed in danger includes only those persons who are placed in danger during the particular crime for which defendant is being scored (here, armed robbery), or whether that number includes all persons placed in danger at any point during the criminal episode? 226a

Discussion:

Violence against a third party in the same transaction as the charged crime is an aggravating factor which should be scored in the guidelines.

A. The definition of "offense characteristics" encompasses conduct beyond the crime itself.

At sentencing, Judge McDonald assessed the defendant ten points for two victims, the victim of the armed robbery, as well as the bystander who was shot in the chest while attempting to apprehend the co-defendant. 211a-212a

Offense variable 9 [MCL 777.39] states the following:

(1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and ***by assigning the number of points attributable to the one that has the highest number of points***:

(a) Multiple deaths occurred-*100 points*
(b) There were 10 or more victims-*25 points*
(c) There were 2 to 9 victims-*10 points*
(d) There were fewer than 2 victims-*0 points*

(2) All of the following apply to scoring offense variable 9:

(a) ***Count each person who was placed in danger of injury or loss of life as a victim.***

(b) Score 100 points only in homicide cases. (emphasis supplied)

Though OV 9 does not discuss the time frame the court can consider when scoring the guidelines, the definitional section, MCL 769.31(d), states:

> "Offense characteristics" means the elements of the crime ***and the aggravating and mitigating factors relating to the offense*** that the legislature determines are appropriate. For purposes of this subdivision, an offense described in section 33b of 1953 PA 232, MCL 791.233b, that resulted in a conviction and that ***arose out of the same transaction as the offense for which the sentencing guidelines are being scored*** shall be considered as an aggravating factor.[11] (emphasis supplied)

When considering a question of statutory construction, the Court first examines the language of the statute to determine whether the words are ambiguous. Unless specifically defined, every word or phrase is accorded its plain and ordinary meaning given their context. However, if a term is not defined in the statute, the Court may consult dictionary definitions in order to aid in construing the term "in accordance with [its] ordinary and generally accepted meaning[]." People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999) If the language is clear, judicial construction is precluded and the statute is enforced as written. When a statute is ambiguous, the Court "seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished." People v Cook, 254 Mich App 635,

[11] In 1999, the section stated the following (with the changes underlined):

> "Offense characteristics" means the elements of the crime and the aggravating and mitigating factors relating to the offense that the commission determines are appropriate consistent with the criteria described in 33(1)(e) of this chapter. For purposes of this subdivision, an offense described in section 33b of 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered as an aggravating factor.

639; 658 NW2d 184 (2003) citing Macomb Co. Prosecutor v Murphy, 464 Mich 149, 158; 627 NW2d 247 (2001)

Because OV 9 itself does not give the time frame that the sentencing court can consider, the pertinent statute to evaluate is the general definitional statute directing the sentencing courts how to evaluate all offense variables. The definition of "offense characteristics", however, is not merely limited to conduct which constitutes the crime. Instead, MCL 769.31(d) includes the aggravating or mitigating factors beyond those present in the elements of the crime. The only requirement is that these factors are related to the crime. The term "relate" is defined by Random House Webster's College Dictionary as 1. to give an account of; tell; narrate, *2. to bring into or to establish association or connection* 3. to have reference or relation 4. to have or establish a sympathetic relationship or understanding. The Random House Webster's College Dictionary: 2d ed (1997) The second definition is the most applicable to MCL 769.31. The term criminal "transaction" [which is used interchangeably with criminal "episode"], was defined by the Judicial Sentencing Guidelines, as "[t]he acts occurred in a continuous time sequence and displayed a single intent or goal". Michigan Sentencing Guidelines, 2d ed (1988) p 10 Acts which occur in a continuous time sequence and display a single intent or goal are clearly associated with or connected to each other.

The Legislature also stated that crimes listed in MCL 791.233(b) resulting in a conviction which occur in the same transaction shall be considered aggravating factors. MCL 791.233(b) lists crimes of violence such as the assault with intent to murder [MCL 750.83] which was committed in this case. "[I]n seeking meaning, words and clauses will

not be divorced from those which proceed and those which follow" [Libbett, supra at 366 citing Herald Co. v Bay City, supra] and in determining the plain meaning of a phrase the court considers its "placement and purpose in the statutory scheme." Morey, supra citing Bailey v United States, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995) Because the Legislature mentioned conduct which occurred in the same transaction as an example of an aggravating factor, when scoring the offense variables, the court should score for conduct in the same criminal transaction unless otherwise directed in the specific offense variable.

In drafting the sentencing guidelines scoring instructions or in OV 9 itself, the Legislature could expressly have limited courts to consideration of conduct during the charged crime, but it did not do so. Cook, supra "'The Legislature is presumed to be familiar with the principles of statutory construction' and when promulgating new laws it is presumed to be aware of the consequences of its use or omission of statutory language." Albers, supra In OV 9, the Legislature did not add, for example, a limitation to scoring conduct "arising out of the sentencing offense" as was included in offense variable 11 [MCL 777.41].[12] "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." Farrington v Total Petroleum, Inc., 442 Mich 201, 210; 501 NW2d 76 (1993)

[12] MCL 777.41(2)(a) indicates, "Score all sexual penetrations of the victim ***arising out of the sentencing offense***." (emphasis supplied)

The Court of Appeals in People v Cook, supra stated that in scoring the sentencing guidelines the courts must look for language of limitation in the definitional section. In Cook, the defendant was convicted of assault with intent to do great bodily harm [MCL 750.84] and fleeing and eluding [MCL 750.479a(3)]. The sentencing court scored conduct which served as a basis for the fleeing and eluding in Cook's guidelines for the assault offense. The Court scored points for OV 19 [MCL 777.49], interference with the administration of justice, even though the assault was completed by the time that Cook fled the police. The Court of Appeals found that scoring for conduct which took place after the sentencing offense was appropriate. The Court stated:

> In drafting the sentencing guidelines scoring instructions, the Legislature could have expressly prohibited sentencing courts from considering facts pertinent to the calculation of the sentencing guidelines range for one offense from being also used to calculate the sentence guidelines range for another offense, but it did not do so. ***Moreover, where the Legislature has not precluded it, we find that where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense.*** (emphasis added) Id. at 641[13]

[13] The Court of Appeals in this case pointed to the instruction of OV 14 as lending support for its conclusion that the entire criminal transaction should not be considered in OV 9. OV 14 [MCL 777.44] states the following:

> (1) Offense variable 14 is the offender's role. Score offense variable 14 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points.
>
> (a) The offender was a leader in a multiple offender situation-*10 points*
> (b) The offender was not a leader in a multiple offender situation-*0 points*
> (cont'd, next page)

Furthermore, when a defendant is convicted of multiple offenses, the guidelines are now scored only for the crime carrying the highest crime class. MCL 771.14(2)(e)(ii) Therefore, conduct which constitutes another crime must be taken into consideration when scoring the offense variable for the crime carrying the highest crime class or else this conduct would not be considered at all in a defendant's guidelines.

Instead of placing words of limitation in OV 9, the words of MCL 777.39 promote a broader reading. By directing the courts to count "each person who was put at risk of injury or loss of life", the Legislature intended that even those who would not

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(cont'd from previous page)
(2) All of the following apply to scoring offense variable 14:

> (a) The entire criminal transaction should be considered when scoring this variable.
>
> (b) If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader.

MCL 777.44(a) and (b), however, must be read together. When constructing statutes, the Court is not permitted to read a statute in isolation, instead, the Court must construe a statute in light of the other statutory provisions in order to carry out the intent of the Legislature. Macomb Co. Prosecutor v Murphy, supra at 159-160 Reading these two sub-sections together, the Legislature was suggesting that, for the sentencing court to score OV 14, a specific defendant does not have to lead throughout the entire transaction but instead that there could be different leaders in different parts of the criminal episode. This statute in actuality reaffirms that the court generally should be reviewing the entire transaction when scoring a particular guideline.

MCL 769.31, the general definitional section, guides the courts on how to score every offense variable except if limited in the specific offense variable. OV 9 has no such limitation.

Also the judicial sentencing guidelines were not limited to scoring conduct solely during the charged crime. See: People v Chesebro, 206 Mich App 468, 473; 522 NW2d 677 (1994) Judicial sentencing guideline OV 9 [which became OV 14] had also directed the court to take into consideration the entire criminal episode when determining whether the defendant was a leader. Michigan Sentencing Guidelines, supra at 100.

traditionally be considered "victims" be counted; the Legislature wished to take into consideration each person who the defendant impacted by his or her conduct.[14]

B. The wording of OV 9 has remained consistent with the judicial sentencing guidelines.

"When the Legislature acts in a certain subject area, it is presumed that the Legislature is aware of existing judicial interpretations of words and phrases within that subject area." People v Lange 251 Mich App 247, 255; 650 NW2d 691 (2002) The enactment of a statute following judicial interpretation can be a useful tool in statutory construction. People v Hawkins, 468 Mich 488, 508; 668 NW2d 602 (2003) The "reenactment rule" of statutory construction indicates that if a word or phrase has received a particular construction by the courts, the Legislature is considered to have adopted this interpretation when using these same terms or phrases. Id. at 510 n 21[15]

The Legislature, when drafting the definition of "victim" in OV 9, was certainly aware of the court's past construction of "victim" in OV 6 of the judicial sentencing guidelines. The wording of the two variables concerning how the term "victim" is defined

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[14] The Court of Appeals in People v Albers, supra similarly construed the term "victim" in OV 3 as including "any person harmed by the criminal actions of the charged party."

[15] This Court stated:

> We note that in the case of a *term of art*, application of the "reenactment rule" would generally be appropriate because such a term by definition carries with it the construction accorded it by the courts. (emphasis original)

Hawkins, supra "A legal term of art is a technical word or phrase that has acquired a particular and appropriate meaning in the law. It is, in a statute, to be construed and understood according to such meaning." People v Law, 459 Mich 419, 425, n 8; 591 NW2d 20 (1999)

is identical and the Legislature did not place any additional limitations on scoring.[16] Scoring for OV 6 was considered appropriate if the defendant endangered other parties in the same transaction as the charged criminal offense. People v Chesebro, 206 Mich App 468, 473; 522 NW2d 677 (1994) In People v Day, supra, for example, the courts specifically contemplated that victims such as Mr. Bish could be included in the scoring for multiple victims. In Day, the defendant robbed a bank and the trial court scored multiple victims. The Court of Appeals affirmed, stating "[w]e do not believe 'victims' for the purposes of this variable are limited to those from whom the defendant takes property. Here, in the event of police ***or other third party apprehension intervention***, each individual in the bank at the time of the robbery was a victim subject to possible injury or death." (emphasis supplied) Id. at 517

C. The manifest intent of the Legislature would be to include violence toward a third party in the same criminal transaction as an aggravating factor.

If the definition of "offense characteristics" is ambiguous, the Court should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute. People v Rehkopf, 422 Mich 198, 207; 370 NW2d 296 (1985) Statutory

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[16] OV 6 of the 1988 Judicial Sentencing Guidelines, *Multiple Victims*, stated the following:

100*	Multiple deaths
10	2 or more victims
0	Not a multiple victim situation

Count each person who was placed in danger of injury or loss of life as a victim.

*Score "100" points only in Homicide crime group. (emphasis added)

Michigan Sentence Guidelines, supra at 26, 99

language is clear and unambiguous only when reasonable minds could not differ with regard to its meaning. Armstrong, supra When the Court seeks to evaluate an ambiguous statute, the Court must also consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose. People v Adair, 452 Mich 473, 479-480; 550 NW2d 505 (1996)

When developing the offense characteristics, the Legislature specifically directed the sentencing commission to take into consideration "the aggravating . . .factors relating to the offense" [MCL 769.31(d)] considering the crimes of violence as more severe.[17] MCL 769.33(1)(e)(ii) Uncharged life-threatening injury inflicted on an individual during the same criminal episode as the charged crime is an aggravating factor which would not be taken into consideration by the prior record variables.

The Sentencing Commission was also given the following task:

> Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.

MCL 769.33(1)(e)(iv); PA 1998, No. 317 264a-265a If violence toward a bystander who attempts to apprehend a perpetrator is not taken into consideration in the guidelines, the sentencing commission would not have accomplished their directive in many cases in

[17] As stated by the House Bill Analyses for HB 5419, 5421, and 5398, the House Bills which later became 1998 P.A. 317, which included the sentencing guidelines:

> Many members of the public are concerned by what they perceive as the failure of the criminal justice system to protect them by locking up violent criminals and keeping them locked up. The revolving door impression of the prison system leads many to feel frustrated about the lack of adequate punishment for criminals and the failure of the system to keep dangerous criminals off the streets. 264a

which defendants harm other individuals in the same criminal episode. If the court could not take into consideration conduct toward another person in the same criminal transaction, the court could only account for this conduct by departing from the guidelines, thus creating disparity.[18] On the other hand, if violence toward third parties were taken into consideration in the guidelines, similar offenders would receive similar sentences rather than disparate departures from the guidelines. This would achieve a goal of the sentencing guidelines, to make sentences for similar conduct uniform. Furthermore, a rule which allows scoring for conduct which occurred during the same criminal episode is easier to apply than a case-by-case determination of when a specific crime actually ended.

OV 9 should be scored for the defendant's conduct. Mr. Bish was shot in the chest with the gun defendant gave to her co-defendant knowing that her co-defendant was going to commit a robbery. It is foreseeable that third parties would attempt to intervene in a robbery (Day, supra) and the guidelines should reflect defendant's culpability and the aggravating factors relating to her crime.

D. Conclusion

The plain meaning of the statute and the intent of the Legislature allow the sentencing court to take into consideration the entire criminal transaction when scoring OV 9.

[18] Only the crime carrying the highest crime class is scored if a defendant is convicted of multiple offenses. MCL 771.14(2)(e)(ii)

ARGUMENT

VI. WHEN A COURT'S SCORING OF THE SENTENCING GUIDELINES CAN NOT INCREASE A DEFENDANT'S STATUTORY MAXIMUM, A SCORING OF OV 1, 3, OR 9 BY THE SENTENCING COURT DOES NOT VIOLATE DUE PROCESS.

Standard of Review:

Issues of law are reviewed de novo by this Court. People v Stone, 463 Mich 558, 561; 621 NW2d 702 (2001); People v Thomas, 438 Mich 448, 450; 475 NW2d 288 (1991)

Issue Preservation:

Defendant did not raise this issue at sentencing or in the Court of Appeals. This Honorable Court granted the People's application for leave and directed the parties to answer the following question:

> Whether the due process clauses of the state and federal constitutions require that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person? 226a

Discussion:

Because the scoring of the sentencing guidelines can never raise a defendant's statutory maximum and the court may take into consideration various factors relating both to the offense and the offender in imposing a judgment within the range prescribed by the statute, due process is not violated by a court's scoring of the guidelines at sentencing rather than submitting the facts to a jury to be proven beyond a reasonable doubt.

The Fifth Amendment of the United States Constitution, including the procedural due process clause, states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation. (emphasis supplied) US Const, Am V

The Supreme Court in In Re Winship, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) held that due process of law includes protecting a defendant against conviction except by proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged.[19]

The Supreme Court in a recent line of cases discussed the definition of an "element" of an offense which triggers this constitutional protection. Not only does the due process clause require an element to be proven beyond a reasonable doubt, but it also must be listed in the indictment under the Sixth Amendment. Almendarez-Torres v United States, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998); Jones v United States, 526 US 227, 243 n 6; 119 S Ct 1215; 143 L Ed 2d 311 (1999) Under the Sixth

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[19] Article 1, §17 of the Michigan Constitution states the following in pertinent part:

> No person shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law.*** (emphasis supplied)

The procedural due process guarantees under the Michigan Constitution, Const 1963, art 1 § 17, provide no greater protection than those guaranteed by the United States Constitution. People v Conat, 238 Mich App 134, 157; 605 NW2d 49 (1999)

Amendment of the United States Constitution, a defendant also has an independent right to a jury determination of every element of a crime. Jones v United States, 526 US at 232

The United States Supreme Court in Almendarez-Torres v United States, supra discussed the differences between elements of a crime which must be listed in the indictment and mere sentencing factors. In that case a defendant was charged with returning to the United States after being deported which exposed the defendant to a two-year maximum. 8 USCA §1326(a) After the defendant pled guilty to the offense, however, his maximum was elevated to 20 years at sentencing because the court found that his initial deportation was subsequent to a commission of an aggravated felony which allowed for an elevation of defendant's maximum penalty. 8 USCA §1326(b)(2) Though on appeal, defendant complained that the facts that elevated his maximum penalty had to be listed on the indictment, the United States Supreme Court found that recidivism was historically a sentencing concern and not an element of a crime and did not have to be listed in the indictment.

The Supreme Court in Almendarez-Torres also commented on the sentencing guidelines. The Court noted that judges had typically exercised their discretion *within broad statutory ranges* and that the sentencing guidelines had recently sought to channel that discretion using "sentencing factors" which no one claimed that the Constitution

thereby made "elements" of a crime.[20] Almendarez-Torres, 523 US at 246

One year after Almendarez-Torres, the United States Supreme Court returned to the definition of an "element" in Jones v United States, supra, in that case considering the question of whether facts unrelated to recidivism that elevated the defendant's statutory maximum had to be proven at a jury trial beyond a reasonable doubt. In Jones, the defendant was charged with carjacking which had a 15-year maximum, and was convicted at a jury trial. However, at sentencing, Jones' maximum was elevated to 25 years because the court made a finding that the victim had suffered serious bodily injury. On appeal, defendant complained that the finding of bodily injury had to be made by the jury and proven beyond a reasonable doubt. The Court stated, "[m]uch turns on the

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[20]It should be noted that a couple years earlier, the Supreme Court also discussed the established history of judicial discretion in sentencing:

> We explained in *Williams* v *New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 1082-1083, 93 L.Ed. 1337 (1949), that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law*." That history, combined with a recognition of the need for individualized sentencing, led us to conclude that the Due Process Clause did not require "that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence." *Id.*, at 250-251, 69 S.Ct. at 1084-1085. Thus, "[a]s a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols* [*v. United States*,] 511 US [738,] 747; 114 S.Ct. [1921,] 1927-1928; [128 L.Ed.2d 745 (1994)](quoting *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d. 592 (1972)).(emphasis supplied)

Witte v United States, 515 US 389, 397-398; 115 S Ct 2199; 132 L Ed 2d 351 (1995)

determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." Jones, 526 US at 232

The Court found that because "an unlimited choice over characterizing a stated fact as an element would leave the State substantially free to manipulate its way out of Winship" [Jones, 526 US at 241], the Court would establish the following bright-line rule:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Jones, 526 US at 243, n 6

The Court stated that, with the establishment of this rule, the jury's role of determining the ultimate maximum penalty of a crime a defendant is subject to, would not be eroded. 526 US at 244

The Supreme Court reiterated this rule a year later in Apprendi v New Jersey, 530 US 466; 120 SCt 2348; 147 L Ed 2d 435 (2000). In Apprendi, the defendant pled guilty to several counts of unlawful possession of a firearm and one count of possession of a bomb. Though these crimes had a maximum penalty of ten years, at sentencing the court elevated the defendant's maximum sentence to 12 years based on a finding by a preponderance that the defendant committed a "hate crime". The United States Supreme Court reiterated that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged. Apprendi, 530 US at 477 When striking down defendant's sentence, Apprendi then reiterated Jones stating:

> Other than the fact of a prior conviction, any fact ***that increases the penalty for a crime beyond the prescribed statutory maximum*** must be submitted to a jury, and proved beyond a reasonable doubt. . . "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. 530 US at 490 citing Jones, 526 US at 252-253 (opinion of Stevens, J.), 526 US at 253 (emphasis supplied)

In rendering this decision, the Court stated, though the issue of the federal sentencing guidelines was not before it, "nothing in [our] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a sentence *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." (emphasis original) 530 US at 481-482, 497 n 21[21]

In fact, in Apprendi the Supreme Court cited the earlier case of Edwards v United States, 523 US 511; 118 S Ct 1475; 140 L Ed 2d 703 (1998) with approval. In Edwards

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[21] The Court reiterated the distinction between true sentencing factors and elements of a crime:

> This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense. 530 US at 494, n 19 (emphasis original)

the defendant had been found guilty of a conspiracy to deliver crack or powder cocaine by a jury. At sentencing however, the court elevated the defendant's guidelines determining that the conspiracy involved crack and finding the amount involved in the conspiracy. Defendant contended that, because a conclusion that crack was involved rather than merely cocaine elevated the defendant's guidelines, a jury had to make this finding and not the judge. The Supreme Court disagreed, finding the judge's fact-finding permissible. However, the Court placed the following caveat on its holding:

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG Section 5G1.1 But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner. 523 US at 515

The Apprendi Court also rejected the possibility that the states would increase the statutory maximum for all offenses to give judges essentially unlimited discretion. The Court stated that "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. . ." (emphasis original) 530 US at 490 n 16

Two years after Apprendi, the United States Supreme Court in Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002) continued to uphold the bright-line rule of Apprendi and Jones when evaluating mandatory minimums. In Harris, the defendant pled guilty to distributing marijuana and was convicted of carrying a

concealed weapon. At sentencing, when the court found that the defendant had brandished a weapon during the charged offenses, the defendant was sentenced to a mandatory minimum of seven years imprisonment. The Supreme Court rejected defendant's contention that any fact increasing a statutory minimum sentence had to be afforded the safeguards accorded to elements. The Court concluded instead that *those facts setting the outer limits of a sentence* are elements of a crime which must be found beyond a reasonable doubt. The Court found that within the range authorized by the jury's verdict, however, the political system could channel judicial discretion, and rely upon judicial expertise by requiring defendants to serve minimum terms after judges make certain factual findings.[22] 536 US at 549-550, 556, 568

In Harris, when discussing the judge's traditional role in imposing sentence, Kennedy, writing for a four-member plurality, stated:

> [I]t is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant "will never get *more* punishment than he bargained for when he did the crime," but they do not promise that he will receive "anything less" than that.
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> * * *
>
> The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. 536

[22] Harris confirmed the validity of the earlier Supreme Court decision of McMillan v Pennsylvania, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986) in which the Court had upheld the constitutionality of a Pennsylvania statute which required the sentencing judge to impose a five-year minimum sentence where the judge found by a preponderance of the evidence that the defendant was visibly possessing a firearm during the course of the offense.

US at 566, (Kennedy, J) citing Apprendi v New Jersey, 530 US at 498 (Scalia, J., concurring)(emphasis original)

Also in the same year of the Harris decision, the Supreme Court decided Ring v Arizona, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) which dealt with a defendant's Sixth Amendment right to a jury trial. The Supreme Court, consistent with its decision in Apprendi, invalidated defendant's death sentence which had been rendered by a judge without giving the defendant an opportunity for a jury trial. Before Ring, in Arizona, though juries rendered verdicts which allowed a sentence of life imprisonment, only a judge could impose capital punishment. Ariz Rev Stat §13-703 The Supreme Court held that "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . .`the required finding [of an aggravated circumstance] expose[d] Ring to a greater punishment than that authorized by the jury's guilty verdict.'" 536 US 589, 604 citing Apprendi v New Jersey, 530 US at 494

In 2003, the United States Supreme Court granted certiorari in the Washington case of State v Blakely, 111 Wash App 851; 47 P3d 149 (2002) which dealt with a departure from the sentencing guidelines. In Blakely, the defendant pled guilty to second-degree kidnapping and second-degree assault. In Blakely, though the defendant's statutory guidelines on the kidnapping offense were 49-53 months, at sentencing the court departed upward to impose a 90-month sentence. Though defendant contended that the court violated Apprendi v New Jersey, supra in imposing this sentence, the Washington Court of Appeals found that because the aggravating factors relied on by the

sentencing court did not increase defendant's statutory maximum, Apprendi was not triggered. 47 P3d at 159

The result of Blakely should stand. Under the Washington Sentencing Reform Act of 1981, various sentencing guidelines are computed for each felony (WA ST 9.94A.510) and a court may depart from the suggested sentencing range for substantial and compelling reasons considering certain aggravating or mitigating circumstances. WA ST 9.94A.535 However [except in limited circumstances which did not apply in Blakely], the court can not sentence a defendant to a sentence which exceeds the statutory maximum. WA ST 9.94A.505(5) The maximum penalty for the crime Blakely was convicted of, second degree kidnapping, being a Class B felony was 10 years. WA ST 9A.40.030(3); WA ST 9.92.010 In Blakely, because the court's 90-month sentence did not exceed the statutory maximum of 120 months, the factors upon which the court based its departure from the sentencing guidelines could not be considered elements and did not have to be proven beyond a reasonable doubt.

The Washington Supreme Court a year earlier in State v Gore 143 Wash 2d 288; 21 P3d 262 (2001) made this exact point. In Gore as well, the defendant appealed the court's departure from the sentencing guidelines on a claimed violation of Apprendi v New Jersey, supra. The Washington Supreme Court held that, consistent with Apprendi and McMillan v Pennsylvania, 477 US 79; 106 S Ct 2411; 911 L Ed 2d 67 (1986), because aggravating factors supporting an increased sentence did not increase the maximum sentence permitted by the statute, the court could depart without a factual

determination being charged, submitted to a jury and proven beyond a reasonable doubt.[23] 21 P3d at 313-314

In like manner, Judge McDonald's scoring of OV 1, 3, and 9 for discharge of a firearm, bodily injury, and multiple victims also do not violate Apprendi or Harris or the due process clauses of the United States or Michigan constitutions. The statutory maximum of defendant's armed robbery offense was life imprisonment [MCL 750.529], the scoring of defendant's guidelines only affected defendant's minimum sentence[24], and

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[23]Florida, Oregon, and Minnesota have agreed with the Washington courts. See: Lee v State, 808 SO 2d 1274 (Fla App, 2002); State v Dilts ___P3d___ (Or App, 2003); State v McCoy, 631 NW2d 446 (Minn App, 2001); unpublished Ashby v State, (Minn App #C2-10-1679, 5/14/02); unpublished Jackson v State, (Minn App #CX-02-693, 12/17/02) 276a-284a

The only state court which plaintiff has discovered finding an Apprendi violation when a court misscored/departed from the guidelines is the Kansas Supreme Court in State v Gould, 271 Kan 394; 23 P3d 801 (2001). However, in Kansas, though prior to July 1, 1993, each offense had a specific statutory maximum [KS ST 21-4501], after July of 1993, the fixed statutory maximums were replaced by sentencing ranges established by calculating guidelines for each offense. KS ST 21-4704 Therefore, if there were no longer any fixed statutory maximums, the top of the guidelines range was the new statutory maximum and a departure from the guidelines without a jury determination and a finding beyond a reasonable doubt would be a violation of Apprendi.

The federal circuits are also in accord with the Washington courts' holdings. See: United States v Robinson, 241 F3d 115 (1st Cir. 2001) cert den 534 US 856; 122 SCt 130; 151 L Ed 2d 84 (2001); United States v Garcia, 240 F3d 180 (2nd Cir. 2001) cert den 533 US 960; 121 S Ct 2615; 150 L Ed 2d 769 (2001); United States v Williams, 235 F3d 858 (3rd Cir. 2000) cert den 534 US 818; 122 S Ct 49; 151 L Ed 2d 19 (2001); United States v Kinter, 235 F3d 192 (4th Cir. 2000) cert den 532 US 937; 121 S Ct 1393; 149 L Ed 2d 316 (2001); United States v Doggett, 230 F3d 160 (5th Cir. 2000) cert den 531 US 1177; 121 S Ct 1152; 148 L Ed 2d 1014 (2001); United States v Corrado, 227 F3d 543 (6th Cir. 2000); Talbott v Indiana, 226 F3d 866 (7th Cir. 2000) and United States v Skidmore, 254 F3d 635 (7th Cir. 2001); United States v Aguayo-Delgado, 220 F3d 926 (8th Cir. 2000) cert den 531 US 1026; 121 S Ct 600; 148 L Ed 2d 513 (2000); United States v Buckland, 289 F3d 558 (9th Cir. 2002); United States v Thompson, 237 F3d 1258 (10th Cir. 2001) cert den 532 US 987; 121 S Ct 1637; 149 L Ed 2d 497 (2001); United States v Nealy, 232 F3d 825 (11th Cir. 2000) reh den 252 F3d 1364 (11th Cir. 2001) cert den 534 US 1023; 122 S Ct 552; 151 L Ed 2d 428 (2001) and United States v Sanchez, 269 F3d 1250 (11th Cir. 2001) cert den 535 US 942; 122 S Ct 1327; 152 L Ed 2d 234 (2002)

[24] In fact, the court departed downward from the guidelines. The guidelines were 108 to 180 months and defendant received a sentence on the armed robbery of 96 months. 215a-216a

defendant's minimum sentence of eight years was not beyond the statutory maximum of life imprisonment. A converse conclusion would categorize each offense variable as an element and would require a jury finding beyond a reasonable doubt of all offense variables in every case. If a fact is an element of an offense, it must be listed on the information (indictment) [Almendarez-Torres, supra] and proven at a jury trial (unless waived) [Jones, supra] beyond a reasonable doubt. Apprendi, supra This Court in People v Mass, 464 Mich 615, 636; 628 NW2d 540 (2001) reaffirmed the holding of Apprendi as applying to factors which "increase[] the penalty for a crime beyond the prescribed statutory maximum" citing United States v Doggett, 230 F3d 160 (5th Cir. 2000). Because the defendant's maximum sentence was not affected by scoring of the guidelines, it did not violate the due process clause of either the Michigan or United States Constitution for the court to score the guidelines based on facts which were not subject to a beyond a reasonable doubt determination.

RELIEF

WHEREFORE, David Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Danielle DeJong, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the Court of Appeals' ruling remanding for resentencing.

Respectfully submitted,

DAVID GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: 
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Assistant Prosecuting Attorney

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